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NOTES.

PRODUCTION OF DOCUMENTS UNDER R. S. OF U. S., SEC. 724—PRODUCTION BEFORE TRIAL—HOW FAR RIGHT IS DISCRETIONARY WITH COURT—THE RIGHT TO CUMULATIVE EVIDENCE.—This section of the revised statutes has frequently given rise to judicial interpretation. But the question generally presented has been whether production by virtue of this statute may be ordered before the trial at law or only at the trial at law. The various Circuit Courts flatly disagree at present on that question. Many of these conflicting rulings are collected in Vol. 56 (O. S.) Penna. Law Review, (American Law Register) pp. 400-402, wherein it is contended that the statute should, by analogy to an auxiliary bill in equity for the discovery of documents, afford production and inspection before trial.

A recent decision of the Circuit Court of the United States for the Western District of Missouri, Rosenberger v. Shubert, *et al.*, 182 Fed. 411, (1910), also holds that the Statute may afford production in advance of trial.

The principal case also decides another very important point, viz.:—that under the same Statute there must exist a necessity for the production of the document, "by reason of the mover's inability to secure the necessary information from any other source * * * for the preparation of the case for trial."

Is this a correct interpretation of the R. S., Sec. 724, Statute which authorizes the Court to order production of documents "which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in Chancery"?

Merwin's Equity, p. 477, asserts exactly the contrary of the above case, the author remarking: "Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs."

In Story's Equity Pleading, Sec. 324 (7th Ed.), it is said: "It is not necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it, if it be merely cumulative evidence of material facts." Mr. Merwin points out that Judge Story was also a member of the Court which decided the case of Brown v. Swan.[1] It is on the supposed application of this Supreme Court decision that the principal case was decided. The true meaning of the case of Brown v. Swan will be considered later.

The principal case was an action at law on a *quantum meruit* for professional legal services. The plaintiff had acted as the defendant's counsel in a litigation which resulted in the acquisition by his clients of the Shubert Theatre in Kansas City, Missouri. The plaintiff moved for production before trial of two books of the defendants, (1) the "weekly statement book" alleged to contain the income and expenses of the said theatre and (2) the "pass-book" containing deposits by the defendants in a particular bank, these deposits having been derived only from the theatre's receipts.

"Plaintiff desires the information * * * for the purpose of showing the amount in controversy in the former action and the financial ability of the defendants to pay the fees sued for." (P. 412.)

The issue at law being, what is a reasonable fee for the plaintiff's services, there can be no doubt whatever that the evidence as to the value of the property gained for the defendant through the plaintiff's successful services was material evidence, pertinent to that issue.

The question presented is therefore plainly this, whether a bill in equity in aid of such an action would lie for the production of these papers in the absence of any averment in the bill that the papers were indispensable to prove the case at law of the plaintiff? In Chancery the test of a plaintiff's right to inspect the defendant's documents in such a case was not the indispensable nature of the

[1] 10 Peters, 497.

documents but whether the documents might have a tendency as relevant evidence to prove the case of the plaintiff. If relevancy existed, discovery was an absolute right. The Chancellor had no discretion.

Vice Chancellor Wigram said in Earl of Glengall v. Frazer, 2 Hare R. 99, "The plaintiff is in this court entitled to an answer from the defendant, not only in respect of facts which he cannot otherwise prove, but also as to facts the admission of which will relieve him from the necessity of advancing proof from other sources." See also Bureton v. Gamul, 2 Atk. 241 and Finch v. Finch, 2 Ves. 492, Lord Hardwicke lays down the chancery practice as being "that every plaintiff is entitled to have a discovery from defendants to enable him to ascertain facts material to the merits of his case either because he cannot prove or in aid of proof; for a man may be entitled to an answer of what he can prove to avoid expense."

Hill, D. J.,[2] most nearly strikes the proceedings in chancery when using the following language "The motion should describe the books or papers with as much certainty as may be and should further state, that, according to the mover's knowledge or information and belief, the books or papers called for will tend to prove the issue in favor of the mover."

In many cases, no doubt, the moving party has alleged a necessity for the production of the papers but the averment went beyond the pleading required.[3]

Judge Wallace, said: "It is a rule of the English Courts that a party may maintain a bill of discovery in equity not only when he is destitute of other evidence than the oath of the adverse party, to establish his case, but also to aid such evidence or render it unnecessary."[4]

Wigram, V. C., said: "He must show that it is or may be evidence which may prove or lead to or assist in proving his case at the hearing of the suit."[5]

Obviously the attempt to exercise discretion where relevancy is admitted introduces this absurdity, that the Chancellor must undertake to predict in advance of trial how convincing the plaintiff's evidence will be to a jury without the corroboration of the documents sought.

The fundamental principle which justifies the production of documents in a bill for documentary discovery, is that the defendant admits by his answer that he has documents in his possession which relate to the plaintiff's case. Unless this admission can be obtained

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[2] Lowenstein v. Carey, 12 Fed. 943 (1882, N. D. Miss.).

[3] United States v. Young, 10 Benedict (1879, So. D. N. Y.), under Section 724; United States v. Hutton, 10 *Idem*, 268 (1807); Bloede v. Bancroft, 58 Fed. 175 (1890).

[4] Colgate v. Compagne Francaise Co., 23 Blatchf. 84 (1885).

[5] Atty. General v. Thompson, 8 Hare, 106 (1849).

from the defendant's answer no production was ordered. Hence no injustice could be done.

This equitable doctrine of documentary discovery is based upon the principle that trials are thereby made more expeditious and justice cheaper if the plaintiff can obtain from the defendant the proof of facts which otherwise the plaintiff could prove, but could prove only at perhaps a greater expense than by the bill for discovery.

Judge Story clearly explains the true meaning of Brown v. Swan in his Equity Pleading, *supra*.

"It would be otherwise if the bill should not only ask discovery but should ask relief in equity, for in the latter case the bill would seek to withdraw the whole jurisdiction from the proper court of law and to give it to the Court of Equity."

G. P. A.

CIVIL LIABILITY OF SOLDIERS OBEYING COMMANDS OF SUPERIOR OFFICERS.—The question which this note is intended to raise is this: Can a solider absolve himself from civil liability for his acts by showing that he was acting in obedience to the command of his superior officer. It is beyond doubt a good defence for acts done in time of war on the field of battle or in the direct conduct of the war itself.[1] Equally true it is not a defence in times of absolute peace and quiet when no disturbance threatens the peace of the community. In war the will of the commanding officer is the law, and the civil law, is suspended for the time being The existence of a system of law implies power to compel obedience, and as the courts of civil law cannot enforce their decrees in time of war, the civil law, as law, must of necessity cease to be the law of the land at that time. But martial law is a law of necessity,[2] and when the necessity for it ceases the civil law becomes again the supreme law of the land. In ordinary times of peace the civil is always above the military law.[3] Any other rule would exempt the militia from obedience to the will of the people as expressed by their legislature, and render the civil rights of all citizens open to the despotic control of the commanding officer of the district.

The question arises, is there not some intermediate state when the country is not at war, in the proper sense, and yet is not in a state of peace and quiet? There are frequent periods in all states when the civil authorities are powerless to quell disturbances, and the strong hand of the military must be called upon to re-establish order. It is just at this point that the conflict arises in the cases; some holding that peace still reigns and that where there is peace

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[1] Birkhimer Military Government, 448

[2] *In re* Ezeta, 62 Fed. 972; Dickelman v. U. S., 92 U. S. 520; Com. v. Shortall, 206 Pa. 165.

[3] Com. v. Small, 26 Pa. 31.